Kotabato Corp (M) Sdn Bhd & Anor v Wisma Central Management Corp

COURT OF APPEAL (KUALA LUMPUR) – CIVIL APPLICATION NO W08-291 OF 2001
RICHARD MALANJUM, ARIFIN ZAKARIA JJCA AND JAMES FOONG J
11 SEPTEMBER 2003

Civil Procedure *— Appeal — Time — Application to enlarge time to file notice of appeal — Reasons for application not in affidavit — Rules of the Court of Appeal 1994*

Companies and Corporations *— Winding up — Appeal against winding up — Appellant not represented by solicitors — Whether appellant could begin or carry on proceedings — Rules of the High Court 1980 O 5 r 6(2), Rules of the Court of Appeal 1994 r 4, Companies Act 1965 s 372*

Companies and Corporations *— Winding up — Appeal against winding up — Whether applicant/contributor could institute proceedings for company — Companies Act 1965 s 253(2)*

Companies and Corporations *— Winding up — Locus standi — Lim Heng Lin filed supporting affidavit — Lim Heng Lin claimed he had authority from appellant — Documents supporting claim not provided — Whether Lim Heng Lin had authority to act for appellant — Whether Lim Heng Lin had locus standi*

The respondent obtained a judgment in default against the appellant for a sum of RM9,960.58 with interests and costs. A winding up petition was brought against the appellant because the appellant failed to settle the sum. The judge allowed the petition and the official receiver was appointed the provisional liquidator. The appellant and the applicant/contributor appealed. The appellant and the applicant/contributor applied that leave be granted to the appellant to appeal to the Court of Appeal, for enlargement of time to file the notice of appeal and that costs of the application be costs in the cause.

Held, dismissing the appeal:

(1) The first factor for consideration was the locus standi of the appellant and the applicant/contributor. The supporting affidavit was filed by one Lim Heng Lin. He described himself as the managing director of the appellant and was granted the authority to file such an affidavit. There was no supporting document to indicate that he actually held this position, and is clothed with authority from the wound up company to move this application. Where the company is already wound up, and when such an application is not made by the liquidator, the demand for authority to act for and on behalf of a wound up company must be stringently examined. A mere description of being a managing director without evidence to support this claim coupled with the authority to specifically pursue this matter was insufficient to

convince the court that Lim Heng Lin was qualified and armed with authority from the appellant to file such an affidavit for and on behalf of the appellant to support this application (see pp 476I, 477B–D). A

(2) The appellant being a company was not represented in this proceedings by solicitors. This was in contravention of O 5 r 6 (2) of the Rules of High Court 1980 read with r 4 of the Rules of the Court of Appeal 1994 and s 372 of the Companies Act 1965 (see pp 477E). B

(3) The court had doubts as to whether the applicant/contributor was permitted by law to bring an application of this nature. If s 253(2) of the Companies Act 1965 was to be utilized then it was for the company to institute such proceedings, not for a contributor. When such a task is within the province of the company then the demand for authority on a person in the company to bring such matter before the court, as well as the need for a solicitor to begin and carry out such proceedings as expressed above, are necessary. There was insufficient evidence to hold that Lim Heng Lin was a person sufficiently armed with authority by the appellant to move this application, and he is not a solicitor by profession to begin and carry on with this proceedings as required by law (see pp 477F–478D). C D

(4) The application must have been for enlargement of time to file the appeal. The court was not enlightened on this by Lim Heng Lin's affidavit. When it is for leave to file an appeal out of time, then there should be some explanation offered as to the reason for the delay in filing the appeal within the specific time provided under the Rules of the Court of Appeal 1994. None of these appeared (see p 478C–D). E F

[Bahasa Malysia summary

Responden telah memperolehi penghakiman ingkar terhadap perayu untuk sejumlah wang sebanyak RM9,960.58 dengan faedah dan kos. Satu petisyen penggulungan telah dibawa terhadap perayu kerana perayu gagal membayar jumlah wang itu. Hakim membenarkan petisyen itu dan pegawai penerima telah dijadikan penyelesai sementara. Perayu dan pemohon/penyumbang merayu. Perayu dan pemohon/penyumbang memohon kebenaran diberi kepada perayu untuk merayu ke Mahkamah Rayuan, untuk perlanjutan masa untuk memfailkan notis rayuan dan bahawa kos permohonan itu adalah kos dalam kausa. G H

Diputuskan, menolak rayuan itu:

(1) Faktor pertama untuk dipertimbangkan adalah locus standi perayu dan pemohon/pernyumbang. Afidavit sokongan telah difailkan oleh Lim Heng Lin. Beliau berkata bahawa beliau adalah I

pengarah urusan perayu dan telah diberi kuasa untuk memfailkan afidavit itu. Tiada dokumen yang menyokong yang menunjukkan bahawa beliau memegang jawatan ini, dan mempunyai kuasa daripada syarikat yang telah digulung untuk memfailkan permohonan ini. Di mana syarikat telah digulungkan, dan apabila permohonan sebegini tidak dibuat oleh penyelesai, tuntutan untuk kuasa untuk bertindak untuk dan bagi pihak syarikat yang telah digulungkan mesti diperiksa dengan teliti. Pengataan sahaja menjadi seorang pengarah urusan tanpa bukti untuk menyokong dakwaan ini dengan kuasa untuk menjalankan perkara ini tidak mencukupi untuk meyakinkan mahkamah ini bahawa Lim Heng Lin layak dan mempunyai kuasa daripada perayu untuk memfailkan permohonan ini (lihat ms 476I, 477B–D).

(2) Perayu, sebagai syarikat tidak diwakil di dalam prosiding ini oleh peguamcara. Ini melanggar A 5 k 6(2) Kaedah-Kaedah Mahkamah Tinggi 1980 dibaca bersama k 4 Kaedah-Kaedah Mahkamah Rayuan 1994 dan s 372 Akta Syarikat 1965 (lihat ms 477E).

(3) Mahkamah mempunyai keraguan sama ada pemohon/penyumbang dibenarkan oleh undang-undang untuk membuat permohonan seprti ini. Jika s 253(2) Akta Syarikat 1965 digunakan ia adalah untuk syarikat untuk memulakan prosiding ini, bukan penyumbang. Apabila kerja seperti ini adalah di dalam lingkungan syarikat maka tuntutan untuk kuaa pada seorang di dalam syarikat itu untuk membawa perkara seperti ini ke mahkamah, dengan keperluan untuk seorang peguamcara untuk memulakan dan menjalankan prosiding itu yang dikatakan di atas adalah perlu. Terdapat keterangan yang tidak mencukupi untuk memutuskan bahawa Lim Heng Lin adalah seorang yang mempunyai kuasa yang mencukupi oleh perayu dan beliau bukan merupakan peguam untuk memulakan dan menjalankan prosiding seperti yang diperuntukkan oleh undang-undang (lihat ms 477F–478D).

(4) Permohonan ini mesti mengenai perlanjutan masa untuk memfailkan rayuan. Mahkamah tidak diberitahu mengenai ini oleh afidavit Lim Heng Lin. Apabila ia untuk kebenaran untuk memfailkan rayuan selepas masa, mesti terdapat penerangan yang diberi sebagai alasan kelewatan di dalam memfailkan rayuan di dalam tempoh masa yang diperuntukkan di dalam Kaedah-Kaedah Mahkamah Rayuan 1994. Tiada penerangan seperti itu (lihat ms 478C–D).]

Notes

For cases on time in appeals, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1237–1258.

For cases on appeals against winding up, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 762.

For cases on locus standi in winding up, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 946–962.

Cases referred to

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325 (refd)

Legislation referred to

Companies Act 1965 ss 243(1), 253(2), 372

Rules of the Court of Appeal 1994 r 4

Rules of the High Court 1980 O 5 r 6 (2)

Lim Heng Lin in person.
Mazlina (KB Chua & Co) for the respondent.

James Foong J (delivering judgment of the court):

Introduction

This is an application by two parties describing themselves as the 'appellant' and 'applicant/contributor' respectively for:

(a) leave be granted to the appellant to appeal to the Court of Appeal against the decision given by the High Court on the 12 October 2001 in the case D4–28–90–2001;

(b) enlargement of time to file the notice of appeal and;

(c) costs of this application to be the costs in the cause.

After having considered this application we dismissed it without the need for the respondent to reply.

We now give our reasons for our decision.

Background

On 1 November 1999, the respondent obtained a judgement in default against the appellant for a sum of RM9,960.58 with interest and costs. Due to the failure of the appellant to settle this sum a winding up petition was brought against the appellant. On 12 October.2001, Justice Wan Adnan Muhamad allowed the petition and the official receiver was appointed the provisional liquidator. Unhappy over this, we believe, the appellant and the applicant/contributor wish to appeal against this High Court decision. Thus the application before us.

Reasons

The first factor for consideration in our minds is the locus standi of the appellant and the applicant/contributor.

A For the appellant, though by the authority of *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325, that ruled that the appellant, besides the court appointed liquidator, also possesses a right to be heard in an appeal against the winding up order after such order was made against it, the court must still be satisfied as to the status of the person in the appellant moving the appeal. In *Sri Hartamas,* the Supreme Court B decided that the affidavit in support of an application by the company's solicitor could not be considered to be that of the company.

In this application before us, the supporting affidavit is filed by one Lim Heng Lin. He has described himself as the managing director of the appellant and was granted the authority to file such an affidavit. Aside from C this assertion there is no supporting document to indicate that he actually holds this position, and is clothed with authority from the wound up company to move this application. We are of the view that in situation such as this, where the company is already wound up, and when such an application is not made by the liquidator, the demand for authority to act for and on behalf of a wound up company must be stringently examined. A D mere description of being a managing director without evidence to support this claim coupled with the authority to specifically pursue this matter is insufficient to convince us that Lim Heng Lin is qualified and armed with authority from the appellant to file such an affidavit for and on behalf of the appellant to support this application.

E Above all, the appellant being a company is not represented in this proceedings by solicitors. This is in contravention of O 5 r 6 (2) of the Rules of High Court 1980 read with r 4 of the Rules of the Court of Appeal 1994 and s 372 of the Companies Act 1965 where it declares:

> Except as expressly provided by or under any written law, a body corporate F may not begin or carry on any such proceedings otherwise than by a solicitor.

Moving now to the status of the applicant/contributor, we have doubts as to whether he is permitted by law to bring an application of this nature. As a contributor, s 243(1) of the Companies Act 1965 provides:

> G At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

H But this is in respect of a stay of proceedings. It does not speak of an appeal against the decision in winding up of a company. In an appeal against a winding up order made, we believe that s 253(2) of the Companies Act 1965 should be more appropriate. Here it caters for:

> "Subject to the rules an appeal from any order or decision made or given in I the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

If s 253(2) of the Companies Act 1965 is to be utilized then it is for the company to institute such proceedings, not for a contributor. When such a task is within the province of the company then the demand for authority on a person in the company to bring such matter before the court, as well as the need for a solicitor to begin and carry out such proceedings as expressed above, are necessary. In this case, as announced earlier, there is insufficient evidence before us to hold Lim Heng Lin was a person sufficiently armed with authority by the appellant to move this application, and he is not a solicitor by profession to begin and carry on with this proceedings as required by law.

Further, we would like to add that since the applicants' intention is to appeal against the decision of the High Court in granting the winding up order against the appellant, then the application before us must be for enlargement of time to file such an appeal. Unfortunately, we are not enlightened on this by Lim Heng Lin's affidavit. When it is for leave to file an appeal out of time, then there should be some explanation offered as to the reason for the delay in filing the appeal within the specific time provided under the Rules of the Court of Appeal 1994. None of these appeared.

Conclusion

It is on these grounds that we dismissed this application.

Application dismissed.

Reported by Chew Phye Ken